REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC. CIVIL APPLICATION NO. E016 OF 2021

DAVID BUNDI .....INTENDED APPLICANT

-VERSUS-

TIMOTHY MWENDA MUTHEE .....RESPONDENT

R U L I N G

1. Before this court is the Applicant's Notice of Motion application dated 19th October 2021. The Applicant seeks for orders THAT:

    1. Spent.

    2. That the court be pleased to order stay of execution of the Judgment issued in Chuka C.M.CC No. 283/2018 on 14/7/2021 and incidental orders thereto pending the hearing and determination of this application.

    2. This Honourable court be pleased to set aside the Ruling/Order delivered on 27th September 2021 dismissing the Appellant's Application dated 22nd September 2021.

    4. This Honourable court be pleased to re-instate the Application dated 22nd September 2021 and filed on the same day and the same be determined on merit.

    5. This Honourable court be pleased to make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.

    6. The costs of this Application be in cause.

2. The Application is based on the grounds on the face of it and is supported by the affidavit sworn by Evelyne Nyaga on 19th October 2021.

3. Judgment was delivered by the trial court in Chuka CMCC No. 283 of 2018 on 14th July 2021 in favour of the Plaintiff for a sum of Kshs. 319,500/=.

4. The present application was canvassed by way of written submissions. The Applicant filed their submissions on 22nd November 2021 while the Respondent filed their submissions on 2nd December 2021.

It is the contention of the applicant in her affidavit sworn on 19/10/2021 that she moved this court vide an application dated 22/9/2021 seeking leave to appeal out of time against the Judgment of Honorable J.M. Njoroge, ***Chief Magistrate in Civil Suit No.283/2018*** delivered on 14/7/2021. The applicant was also seeking an order that there be a stay of execution of the Judgment and decree in the said suit pending the hearing and determination of the intended appeal.

The applicant contends that she later discovered that the court had dismissed the application as the court could not communicate the orders to her. The Applicant avers that she had every intention to prosecute the suit and she had no intention to delay the application. It is her contention that if application is not allowed she will suffer irreparable loss. The applicant contends that the mistake of the advocate should not be visited upon her clients. The applicant submits that the application has been filed timeously and the respondent is not likely to suffer any prejudice.

5. The respondent filed a replying affidavit sworn on 15/11/2021 by Don.Z. Ogweno opposing the application. He contends that the motion

does not meet the requirement for an order to review court orders. That the motion is ambiguous, bereft of facts and truth and in essence the applicant has come to court with unclean hands.

6. Applicant's Submissions

The applicant submits that the court has discretion to set aside exparte orders. She relies on **Section 3A of the Civil Procedure Act** which gives court inherent powers to issues such orders as may be necessary to meet the ends of justice. She relies on the case of ***Wachira Karani-v- Bildad Wachira [2016] eKLR*** where the court stated that ***"the fundamental duty of the court is to do justice between the parties……. Fundamental to that duty is that parties should be allowed a proper opportunity to put their cases upon the merits of the matter…….. The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit"***

The applicant further submits that **Section 1A and 1B of the Civil Procedure Act** enjoins the court to ensure that there is just determination of the dispute and that court should always opt for lower rather than the higher risk of injustice. She has urged the court to find that overriding objectives over shadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. See ***Stephen Boro Gitiha –v- Family Finance Building Society and 3 Others, Court of Appeal Nairobi C.A No.263/2009***

The applicant urges the court to exercise its wide powers under **Section 1A,1B and 3A Civil Procedure Act (Cap 21 Laws of Kenya)** and allow the application in the interest of Justice.

Respondent's Submissions

7. The Respondent, on the other hand, contends that the prayers sought in the present application are a non-issue as per the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules (2010)** and **Section 98** of the **Civil Procedure Act** which are not relevant in view of the prayers the applicant is seeking.

8. The Respondent further contends that the present application should fail for the non-disclosure of the impugned order/decree of 27th September 2021. He submits that the same is not attached to the affidavit sworn by Everlyne Nyaga on 19th October 2021 in support of the present application.

Issues for determination

9. Having considered the present application, the affidavits in support and opposition of the said application, as well as the respective submissions of the parties, it is my view that the main issues for determination by this court are:

1. Whether this court should set aside the Ruling/Order delivered on 27th September 2021 dismissing the Applicant's application dated 22nd September 2021.

2. Whether this court should reinstate the Application dated 22nd September 2021 for determination on merit.

3. Who should bear the costs of this Application?

10. Analysis

Whether the court should set aside the order of 27/9/2021 dismissing the application.

An issue has been raised by the respondent that the application has been brought under provisions which are not relevant. This is with regard to **Section 98 and Order 45 Rule 1 Civil Procedure Rules**.

I have considered the submission **Order 51 rule** provides that the provisions under which the application is brought be stated on the application. **Order 51 Rule 10 Civil Procedure Rules** provides that:

> **"(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated,but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
> **(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

The rule is not couched in mandatory terms. It further provides that no objection shall be made and no application shall be refused for failure to comply with the rule. It is my view that failure to quote the provisions under which the application is brought on the application and by extension quoting the wrong provisions is not a bar that could prevent the court from doing substantive justice in the matter. The primary duty of the court is to do justice and that duty cannot be fettered by procedural technicalities. The Constitution under **Article 159** on judicial authority has urged courts to do justice without undue regard to procedural technicality. **Article 159(2)(d)** states:

> **"Justice shall be administered without undue regard to procedural technicalities."**

11. The Court has inherent powers to give orders which are necessary to meet the ends of justice. **Section 3A Civil Procedure Act** provides:

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**

This is further buttressed by **Section 1A** & **1B of the Civil Procedure Act** which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.

The Respondent has opposed this application on technicalities. It is my view that the law has elaborately made provisions which cushion the court from leaning on technicalities at the expense of doing justice. The courts will determine disputes on the merits and lean on the principle of natural justice which guide all courts, that is, a party in a dispute must be given an opportunity to be heard. From the foregoing, I find that the objection by the respondent cannot be sustained. This court should therefore consider the merits of the application.

The applicant is seeking to reinstate the application dated 22/2/2021 on the ground that the court could not communicate the orders to her. From the record, the court when dealing with the said application on 22/9/2021 in chambers declined to certify the application as urgent and directed that the application be served on the respondent so that it could be heard inter-partes on 28/9/2021.

On 28/9/2021, the applicant and the respondent were not in court. I have not come across any evidence to show that the applicant was informed of the orders which I issued on 22/9/2021. Though the applicant states that she had not given the email address where it could be served, such information was not communicated to them. Furthermore, the applicant had given the email address of the advocate. It is my view that the state of affairs was occasioned by failure on the part of the registry to communicate the directions given by the court on 22/9/2021.

Under **Order 12 of the Civil Procedure Rules** the court will dismiss an application where a party fails to attend court with full notice of the hearing date. Where a party demonstrates that it was not aware of the hearing date through no guilt of its own, the court will exercise its discretion in favour of the party. **Order 12 Rule 7 Civil Procedure Rules** (supra) it is provided:

> **"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."**

The Court of Appeal in **Njue Njagi v. Ephantus Njiru & Another [2016] eKLR** stated that dismissal of a suit for none attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.

The court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. See **Shah v. Mbogo & Another [1967] E.A. 116**.

In **Patel v. E.A. Cargo Handling Services Ltd [1974] E.A. 75** the court stated that:

> **"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just… The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."**

In this matter there was a blunder as the applicant was not informed of the hearing date. In **Philip Chemowolo & Another v Augustine Kubende [1986] KLR** it was stated that:

> **"I think a distinguished equity Judge has said:**
>
> ***Blunders will continue to be made from time to time and it does not follow that because a mistake has been made*, that a party should suffer the penalty of not having his case heard on merit…"**

The applicant as I have pointed was not made aware of the hearing date. The respondent will not suffer any prejudice as he will have a chance to challenge the application. I also note that the application was brought without undue delay.

I find that the applicant has shown sufficient cause to warrant this court to set aside the order and reinstate the application.

In conclusion.

I order as follows:

1. The order issued by this court on 28/9/2021 is set aside.

2. The application dated 22/9/2021 is reinstated and shall be heard and determined on merits.

3. Costs follow the event. I award the applicant the costs of the application.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 10TH DAY OF FEBRUARY, 2022

L.W. GITARI

JUDGE

10/2/2022

Ruling has been read out in open court.

L.W.GITARI

JUDGE

10/2/2022